Office - Supreme Court, U.S.
FILED
MAY 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CARL HOLDER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois

MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Counsel for Respondent

MARCIA L. FRIEDL
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 32353—50—5-17-84)

QUESTIONS PRESENTED

1. Whether petitioner has presented a substantial federal question where the lower court correctly upheld the constitutionality of subsection (a)(3) of the Illinois intimidation statute based upon *Broadrick*'s overbreadth analysis and where there exists no viable conflict among the courts on the issue?

2. Whether petitioner may complain that the Illinois intimidation statute fails to give fair warning to prospective actors where his own conduct fell squarely within its prohibition?

3. Whether petitioner has failed to present a substantial federal question where long-standing precedent of this Court has established that the states may constitutionally proscribe threats to damage property in the context of labor disputes?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENIAL OF THE WRIT:	
I.	
PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION WHERE THE LOWER COURT CORRECTLY UPHELD THE CONSTITUTIONALITY OF SUBSECTION (A)(3) OF ILLINOIS' INTIMIDATION STATUTE BASED UPON *BROADRICK'S* OVERBREADTH ANALYSIS AND WHERE THERE EXISTS NO VIABLE CONFLICT AMONG THE COURTS ON THE ISSUE	2
II.	
PETITIONER CANNOT COMPLAIN THAT THE ILLINOIS INTIMIDATION STATUTE FAILS TO GIVE FAIR WARNING TO PROSPECTIVE ACTORS WHERE HIS OWN CONDUCT FELL SQUARELY WITHIN ITS PROHIBITION	5
III.	
PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION WHERE LONG-STANDING PRECEDENT OF THIS COURT HAS ESTABLISHED THAT THE STATES MAY CONSTITUTIONALLY PROSCRIBE THREATS TO DAMAGE PROPERTY IN THE CONTEXT OF LABOR DISPUTES	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	PAGE
Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942)	7
Automobile Workers v. Russell, 356 U.S. 634 (1958)	8
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	2
Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942)	3
Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977)	8
Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968), *rev'd on other grounds sub nom. Boyle v. Landry*, 401 U.S. 77 (1971)	2
Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 136 (1976)	8
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1983)	7
New York v. Ferber, 458 U.S. 747 (1982)	4
Parker v. Levy, 417 U.S. 733 (1974)	6
People v. Gallo, 54 Ill. 2d 343, 297 N.E.2d 569 (1973)	3, 4, 5
People v. Smith, 78 Ill. 2d 298, 399 N.E.2d 1289 (1980)	3
Spence v. Washington, 414 U.S. 405 (1974) (per curiam)	3
United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954)	8
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)	6
Watts v. United States, 394 U.S. 705 (1965)	7
Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983)	2
Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957)	8

STATUTES:	
Ill. Rev. Stat. 1979, ch. 38, § 12-6(a)(3)	*passim*
29 U.S.C. § 163	6

In The

Supreme Court of the United States

October Term, 1983

CARL HOLDER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully in the argument contained herein, respondent does not believe that petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case presented by petitioner.

REASONS FOR DENIAL OF THE WRIT

I.

PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION WHERE THE LOWER COURT CORRECTLY UPHELD THE CONSTITUTIONALITY OF SUBSECTION (A)(3) OF ILLINOIS' INTIMIDATION STATUTE BASED UPON *BROADRICK*'S OVERBREADTH ANALYSIS AND WHERE THERE EXISTS NO VIABLE CONFLICT AMONG THE COURTS ON THE ISSUE.

Petitioner argues that certiorari should be granted because the Illinois Supreme Court incorrectly applied the first amendment analysis of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), in upholding the constitutionality of the Illinois intimidation statute [Ill. Rev. Stat. 1979, ch. 38, § 12-6(a)(3)] and because the decision is in conflict with those of one federal district and one federal circuit court. *Broadrick*, however, clearly supports the court's requirement that petitioner establish section 12-6(a)(3) to be substantially overbroad and was decided after *Landry v. Daley*, 280 F. Supp. 938 (N.D. Ill. 1968), *rev'd on other grounds sub nom. Boyle v. Landry*, 401 U.S. 77 (1971), the district court case upon which petitioner relies. Neither is the court's rejection of petitioner's first amendment challenge in conflict with the Ninth Circuit's ruling in *Wurtz v. Risley*, 719 F.2d 1438 (9th Cir. 1983). Petitioner has, therefore, not presented a substantial federal question for review by this Court.

Broadrick recognized that the potential application of a statute to an area protected by the first amendment does not necessarily serve to invalidate the statute in its entirety:

> Although such laws, of too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

42 U.S.C. at 615. Accordingly, this Court held:

> . . . [P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Id.

Petitioner attempts to avoid the *Broadrick* ruling by arguing that subsection 12-6(a)(3) of the Illinois intimidation statute regulates pure speech. The statute's prohibition, however, involves conduct as well as speech when analyzed in light of first amendment concerns. One's physical conduct may be protected as a consequence of its role in the communication of information or opinion. *See, e.g., Spence v. Washington*, 418 U.S. 405 (1974) (per curiam). Conversely, speech may not involve the communication of information or opinion and, as such, may be fairly considered a "verbal act." *See, e.g., Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942). The threats contemplated by the intimidation statute are clearly not communications of information or belief. The threat itself must be one to engage in criminal conduct. Further, the communication must be made with the specific intent to coerce [*People v. Smith*, 78 Ill. 2d 298, 399 N.E.2d 1289 (1980)] and must, in its context, have a reasonable tendency to create a fear in the victim that the speaker will perform the threatened act. *People v. Gallo*, 54 Ill. 2d 343, 297 N.E.2d 569 (1973). An attempt to coerce another

through language, under circumstances reasonably causing apprehension that the threat will be carried out, is no less "conduct" than an attempt to physically restrain the individual. Because the statute is not directed at speech, but rather the intended coercive effect of threats to violate the law, it is like any other statute defining a crime which may incidentally involve communication.

In any event, any need to arbitrarily categorize statutes regulating speech and those regulating conduct has been alleviated by *New York v. Ferber*, 458 U.S. 747 (1982), where this Court applied the substantial overbreadth doctrine in the context of traditional forms of expression such as books and films. Although *Ferber* involved the state's regulation of child pornography, nowhere did this Court intimate that *Broadrick*'s rationale should not control in all areas of so-called "pure speech." To the contrary, this Court reiterated that the overbreadth doctrine should be employed by the courts only as a last resort.

Petitioner argues that the lower court's ruling is nonetheless inconsistent with the Ninth Circuit's decision in *Wurtz*, where the court examined Montana's intimidation statute, employing language similar to that found in Illinois', for substantial overbreadth. *Wurtz* recognized that while threats have traditionally been punishable without offending the first amendment, the threat must have a reasonable tendency to produce a fear that the threat will be carried out. Because the Montana statute had not been so limited by state judicial construction, the court found it to be substantially overbroad. In Illinois, on the other hand, it has been clear since 1973 that a threat punishable by section 12-6 must have a reasonable tendency to create apprehension that the threat will be carried out and must be coercive. *See People v. Gallo*, 54 Ill. 2d 343,

297 N.E.2d 569 (1973). Not only is the victim likely to suffer personal apprehension from the coercive threat, he can fail to comply with the speaker's demands only at the risk that a criminal offense will be committed. If the offense is actually committed, it will have been the direct result of the victim's non-compliance. Yet a criminal offense, committed against all citizens of the State, is deemed too serious to leave the law's enforcement in the hands of private citizens.

Because section 12-6 is limited to true threats which have a reasonable tendency to force another to act against his will, a majority of the hypothetical threats offered by petitioner would not, under normal circumstances, constitute intimidation. As in *Broadrick*, the extent that the statute as construed may infringe upon specific protected activity is insubstantial in relation to the broad range of activity sought to be prohibited which is manifestly subject to state regulation. Further, as in *Broadrick*, the statute is not censorial, directed at particular groups or viewpoints; rather, it seeks to regulate activity in an even-handed and neutral manner. Because the Illinois Supreme Court's decision in this case is mandated by *Broadrick* and there exists no actual conflict among the courts on the issue, exercise of this Court's certiorari jurisdiction is not warranted.

II.

PETITIONER CANNOT COMPLAIN THAT THE ILLINOIS INTIMIDATION STATUTE FAILS TO GIVE FAIR WARNING TO PROSPECTIVE ACTORS WHERE HIS OWN CONDUCT FELL SQUARELY WITHIN ITS PROHIBITION.

Nor has petitioner presented a substantial federal question concerning the alleged vagueness of section 12-6(a)(3).

Petitioner argues that the phrases "without lawful authority" and "any criminal offense" render the statute vague because he could not discern the proscribed conduct from within its four corners. Incorporation by reference to other laws, however, is perfectly permissible. *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Moreover, as explained in Argument III, *infra*, petitioner's conduct fell squarely within the statute's prohibition and one to whom a statute clearly applies may not successfully challenge it for vagueness. *Parker v. Levy*, 417 U.S. 733 (1974).

III.

PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION WHERE LONG-STANDING PRECEDENT OF THIS COURT HAS ESTABLISHED THAT THE STATES MAY CONSTITUTIONALLY PROSCRIBE THREATS TO DAMAGE PROPERTY IN THE CONTEXT OF LABOR DISPUTES.

Petitioner argues that the threat underlying his intimidation conviction was merely a threat to strike protected by the first amendment and Section 13 of the National Labor Relations Act (29 U.S.C. § 163), and that state control over his conduct has been preempted. Petitioner's threat, however, was not merely a threat to strike but a coercive, express threat to imminently and intentionally damage his employer's property. Such threats have consistently been found by this Court to be constitutionally prohibited by the states in an exercise of their police powers.

Contrary to petitioner's suggestion, the appellate court did not find his threat, "the trucks that . . . just left are sitting down the road and the drums aren't turning till [Countryman] signed a contract" (R. 488), to be a mere

threat to strike. Rather, both the jury and the appellate court found petitioner's statement to be an unequivocal, coercive threat to criminally damage his employer's property. *People v. Holder*, 119 Ill. App. 3d 366, 372, 456 N.E.2d 628, 632, 633 (2nd Dist. 1983).* Further, the factual finding is clearly supported by the record. Both petitioner and his victim were aware that the concrete in the trucks, which petitioner had assured were under the employees' sole control, would harden and damage the trucks should the drums be immobilized. (R. 483, 825) The threat was repeated in precisely the same language to one person (R. 557) and it was again stated to another "that Countryman should come out and sign a contract, that the trucks weren't moving, that the drums would get hard." (R. 548) Petitioner specifically admitted that his intent was to force his employer to sign the lengthy, complex document presented "blind." (R. 811)

Petitioner's threat did not, as that in *Watts v. United States*, 394 U.S. 705 (1965), constitute hyperbole. Further, although the mere fact that speech may be coercive does not remove it from the reach of the first amendment, coercive threats of violence to persons or property have never been protected. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1983). Nor was petitioner's conduct, occurring in the context of a labor dispute, authorized by federal labor law or its state regulation preempted. Since this Court's decision in *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), this Court has repeatedly observed that

* In acquitting petitioner's co-defendants of intimidation on an accountability theory, the jury without question determined that petitioner had exceeded any authority given him to convey a mere threat to strike.

"policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States." *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 136 (1976). *See also Automobile Workers v. Russell*, 356 U.S. 634 (1958); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 299 (1977); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957). Because this Court's precedent establishes petitioner's intentionally coercive threat to lie within the ambit of conduct properly regulated by the State of Illinois, he has failed to present a substantial federal question for review.

CONCLUSION

For the foregoing reasons, respondent submits that there exists no reason for this Court to exercise its jurisdiction over this case and requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

MARK L. ROTERT *
Assistant Attorney General
Counsel for Respondent

MARCIA L. FRIEDL
Assistant Attorney General
Of Counsel

* Counsel of Record